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## Recent Development: Mending the Tear in the Internet Radio Community: A Call for a Legislative Band-Aid

Allison Kidd<sup>1</sup>

*I dream of Jeannie with the light brown hair  
Floating like a vapor on the soft, summer air.  
I sigh for Jeannie, but her light form strayed  
Far from the fond parts round her native glade;  
Her smiles have vanished and her sweet songs flown  
Flitting like the dreams that have cheered us and gone.*<sup>2</sup>

“Jeannie with the Light Brown Hair” was the most popular song of 1941,<sup>3</sup> despite the fact it was written nearly ninety years earlier.<sup>4</sup> In 1939, the American Society of Composers, Authors and Publishers (“ASCAP”) increased the royalty rates it demanded of radio stations to prices so high the radio stations refused to pay.<sup>5</sup> For ten months, radio stations aired only public domain songs like “Jeannie with the Light Brown Hair” and the works of previously unknown artists.<sup>6</sup> That same year, Broadcast Music, Incorporated (“BMI”) emerged to challenge ASCAP’s monopoly and, in the process, introduced America to pop music.<sup>7</sup>

Today, Internet-based radio broadcasters are caught in a similar royalty rate fight. Like BMI, which once was a small and powerless organization, Internet radio broadcasters are making a name for themselves by introducing America to new forms of music. The number of daily listeners continues to swell.<sup>8</sup> In 1999,

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<sup>2</sup> STEPHEN FOSTER, *Jeannie with the Light Brown Hair* (1854).

<sup>3</sup> JOHN McDONOUGH, *Publishing War between ASCAP and BMI 60 years ago and how it Paved the Way for the Growth of Popular Music* (NPR radio broadcast, Oct. 30, 2001).

<sup>4</sup> See FOSTER, *supra* note 2.

<sup>5</sup> McDONOUGH, *supra* note 3.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> See ARBITRON AND EDISON MEDIA RESEARCH, INTERNET 9: THE MEDIA AND ENTERTAINMENT WORLD OF ONLINE CONSUMERS SPECIAL RADIO INDUSTRY

the Arbitron Company, a premier media and marketing research firm, estimated that thirty-five percent, or approximately 29 million Americans, had tried streaming audio or video such as Internet radio stations.<sup>9</sup> In early 2003, two Internet-only radio stations finished number one and two on a weekly industry rating of online listenership by receiving more requests for their broadcasts than traditional stations based in London and New York did for their simulcasts.<sup>10</sup> Additionally, the Internet radio listening options continue to grow every day.<sup>11</sup> Listeners can find the widest variety of programming among some of the newest and smallest webcasters. These stations offer news, talk, Motown, UK garage electronica, swing, and Hawaiian music, among other choices. While Internet radio programming, or “webcasting,” may still be in its infancy, it has enormous potential.

The future of the smallest stations will depend on the structure of copyright law and payment of royalties. After

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EDITION, SPECIAL RADIO INDUSTRY EDITION (SEPT. 5, 2002), at <http://www.arbitron.com/downloads/I9NAB.pdf> (on file with the North Carolina Journal of Law & Technology).

<sup>9</sup> *Id.* This reflects growth from just 6% of Americans in 1998. JOAN FITZGERALD AND LARRY ROSIN, RADIO AND E-COMMERCE: THE ARBITRON INTERNET LISTENING SURVEY II, ARBITRON AND EDISON MEDIA RESEARCH 10 (1999), at <http://www.arbitron.com/downloads/E-Commerce.pdf> (on file with the North Carolina Journal of Law & Technology). Total time spent listening to Internet radio is also growing. Listening time increased 164% between January and mid-November, 2002. Jack Myers, *Arbitron Issues First Weekly “Measurecast” Ratings*, JACK MYERS REPORT, Nov. 18, 2002, available at <http://www.arbitron.com/downloads/jackmyersreport.pdf> (on file with the North Carolina Journal of Law & Technology).

<sup>10</sup> “MEASURECAST, INC., ARBITRON’S MEASURECAST WEEKLY TOP 25: WEEK OF 1/27–2/2 (2003), at [http://www.arbitron.com/newsroom/archive/WCR02\\_06\\_03b.htm](http://www.arbitron.com/newsroom/archive/WCR02_06_03b.htm) (on file with the North Carolina Journal of Law & Technology). See the most current rankings on-line at <http://www.measurecast.com/>.

<sup>11</sup> No concrete count of Internet radio stations in the United States is available because the number changes daily. The number of stations reached an estimated high of 5,710 in 2001, but fell to 3,940 in the midst of the royalty debate. *BRS Media’s Web-Radio Reports a Steep Decline in the Number of Stations Webcasting*, SEATTLE BUSINESS WIRE, Sept. 12, 2002, available at [http://www.businesswire.com/cgi-bin/f\\_headline.cgi?bw.091202/222550201](http://www.businesswire.com/cgi-bin/f_headline.cgi?bw.091202/222550201) (on file with the North Carolina Journal of Law & Technology).

convening a Copyright Arbitration Royalty Panel ("CARP") to suggest rates, the Librarian of Congress recently ordered webcasters to pay royalties so high that many would be put out of business.<sup>12</sup> Legislators reacted quickly and introduced the Internet Radio Fairness Act ("IRFA") to establish royalty rates that more webcasters could afford.<sup>13</sup> IRFA, which set royalty rates, was quickly usurped by the Small Webcasters Settlements Act ("SWSA"), which was signed into law at the end of the 107<sup>th</sup> Congress.<sup>14</sup> Under SWSA, webcasters must either negotiate their own royalty rate agreements by June 20, 2003, or pay the Librarian of Congress' controversial rates.<sup>15</sup> While a private agreement was negotiated between webcasters and the recording industry in December 2002,<sup>16</sup> many webcasters argue that the agreed upon rates still are too high for the smallest Internet radio stations.<sup>17</sup> Furthermore, the terms and methods of negotiation used to achieve SWSA and the subsequent negotiated agreement have created a division in the webcaster community.<sup>18</sup> The smallest webcasters face an impending summer payment deadline<sup>19</sup> and still are displeased with their royalty options.

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<sup>12</sup> In February 2003, eight Denver-area Internet radio stations stopped broadcasting, at least until the royalty debate is settled. See MICHAEL ROBERTS, *A Dam in the Stream*, DENVER WESTWORD, Feb. 6, 2003. See also *Watermarks, Tax Should Replace Copyright Law, Panelist Says*, 4 WASHINGTON INTERNET DAILY (Jan. 7, 2003).

<sup>13</sup> See H.R. 5285, 107th Cong. (2002).

<sup>14</sup> See Small Webcasters Settlements Act, Pub. L. No. 107-321 (Dec. 4, 2002) (to be codified in scattered sections of 17 U.S.C.).

<sup>15</sup> See *id.*

<sup>16</sup> Notification of Agreement Under the Small Webcaster Settlement Act of 2002, 67 Fed. Reg. 78,510 (Dec. 24, 2002).

<sup>17</sup> Hobbyist, college, and nonprofit webcasters often operate Internet radio stations for entertainment or informational purposes and earn no revenue. See, e.g., KILL RADIO COLLECTIVE, at <http://www.killradio.org>; DETROIT INDUSTRIAL UNDERGROUND, at <http://www.detroitindustrial.org>.

<sup>18</sup> The webcasting community currently is "incredibly fragmented." E-mail interview with Ken Freedman, Station Manager, WFMU-FM (Mar. 4, 2003) (on file with the North Carolina Journal of Law & Technology).

<sup>19</sup> See Small Webcasters Settlements Act, Pub. L. No. 107-321 (Dec. 4, 2002) (to be codified in scattered sections of 17 U.S.C.); U.S. COPYRIGHT OFFICE, *WEBCASTING RATES*, Jan. 13, 2003, available at [http://www.copyright.gov/carp/webcasting\\_rates.html](http://www.copyright.gov/carp/webcasting_rates.html).

This Recent Development posits that Congress should pass legislation setting special hobbyist royalty rates and reforming the CARP system to ensure equal protection for the smallest webcasters' unique broadcasts, keeping in tune with the growth of Internet radio. The first part of this Recent Development describes Internet radio. The second part contains an overview of the relevant regulatory scheme.<sup>20</sup> In its third part, this Recent Development paints a picture of a divided webcasting community and describes remaining problems related to royalty rates.<sup>21</sup> Finally, this Recent Development suggests legislative intervention to both assist webcasters whose interests have not been represented in the royalty rate disputes and address similar disputes in the future.

## I. Internet Radio

Internet radio is exactly what one might expect: radio broadcast over the Internet.<sup>22</sup> Some stations broadcast only over the Internet, while others broadcast simultaneously over the Internet and an AM/FM stations.<sup>23</sup> Internet radio broadcasts, or

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<sup>20</sup> For a more in-depth treatment of webcasting copyright laws in effect before August 2001, see Kimberly L. Craft, *The Webcasting Music Revolution Is Ready to Begin, as Soon as We Figure Out the Copyright Law: The Story of the Music Industry at War with Itself*, 24 HASTINGS COMM. & ENT. L.J. 1 (2001).

<sup>21</sup> Recent legislation also imposes extensive reporting requirements on webcasters. Jason Perlmutter, Station Manager of WXYC-FM at the University of North Carolina explains that small webcasters who can afford the royalties currently do not have the necessary technology to fulfill recordkeeping requirements. Interview with Jason Perlmutter, Station Manager, WXYC-FM, University of North Carolina at Chapel Hill (Mar. 5, 2003). WXYC-FM was the first traditional radio station in the nation to simulcast over the Internet. *Id.* However, this Recent Development focuses primarily on the royalty rate issue as it has been the primary focus of recent debates.

<sup>22</sup> See Richard D. Rose, *Connecting the Dots: Navigating the Laws and Licensing Requirements of the Internet Music Revolution*, 42 IDEA 313, 314 (2002).

<sup>23</sup> See Raffi Zerounian, *I. Intellectual Property: A Copyright: 1. Digital Media: c) Internet Broadcasting: Bonneville International v. Peters*, 17 BERKELEY TECH. L.J. 47 (2002).

webcasts, transfer audio as data over the Internet.<sup>24</sup> The data is transferred in real time in the form of "streaming audio."<sup>25</sup> Listeners tune in to Internet radio stations transmissions already in progress. Unlike listening to a car radio, however, one will never travel outside the listening area of Internet radio.<sup>26</sup> One can just as easily listen to a station in Miami as one can in Moscow.<sup>27</sup> To try Internet radio for the first time, one need only a few basics, including a computer with speakers and a soundcard, an Internet connection, and the proper software.<sup>28</sup>

Internet radio provides many more listening choices than traditional radio.<sup>29</sup> Starting an Internet radio station is virtually unregulated, as opposed to the heavily regulated communications industry in which traditional stations must operate.<sup>30</sup> Indeed, most

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<sup>24</sup> See generally, e.g., Mark Radcliffe, *Using Music on the Web*, in 1 MUSIC ON THE INTERNET: UNDERSTANDING THE NEW RIGHTS & SOLVING NEW PROBLEMS (Anthony V. Lupo and Mark F. Radcliffe eds., Practising Law Institute 2001).

<sup>25</sup> See *Congressional Testimony before the House Energy and Commerce Committee*, 107th Cong. (Apr. 25, 2002) (statement of Larry Jacobson, Pres. and CEO, RealNetworks) (explaining that "[s]treaming enables consumers to enjoy uninterrupted, real-time broadcasts over the Internet, by compressing digital media files and dividing them into packets, that then are delivered to the consumer's personal computer").

<sup>26</sup> Distance is not a factor in Internet radio transmissions because the data need not travel through airwaves. See LYCOS, INC., CONTEMPLATING INTERNET RADIO, LYCOS HELP & HOW TO (2002), at <http://howto.lycos.com/lycos/step/1,,86+23077+12731,00.html> (on file with the North Carolina Journal of Law & Technology).

<sup>27</sup> *Id.*

<sup>28</sup> Tedford James, *Getting Started: Internet Radio*, RADIO ENTHUSIAST, Dec. 18, 2002, at [http://www.radioenthusiast.com/internet\\_radio.htm](http://www.radioenthusiast.com/internet_radio.htm) (on file with the North Carolina Journal of Law & Technology). Most computers built in the past few years already have speakers and a soundcard. The necessary software, called a "player," is available free online. The three major players include REALPLAYER, at <http://www.realplayer.com>; WINDOWS MEDIA PLAYER, at <http://www.microsoft.com/windows/windowsmedia/players.aspx>; and QUICKTIME, at <http://www.apple.com/quicktime/products/qt/>.

<sup>29</sup> *Id.*

<sup>30</sup> For example, anyone can set up her own Internet radio station by visiting <http://www.live365.com/broadcast/packages.html> and, after the 14-day free trial, pay just \$4.95 per month for basic webcasting privileges. Hobbyist Ashley Norris explains how in *Modems and Rockers; New DJ Ashley Norris Shares the Secret of His Success*, THE MIRROR (LONDON), Jan. 10, 2003, at 54-55.

stations are established and managed by “small businesses, community and college broadcasters and hobbyists.”<sup>31</sup> When selecting a station, many Internet radio listeners look for the variety that only these small webcasters can provide.<sup>32</sup>

In addition to providing individual listeners with entertainment and news, Internet radio generates numerous other, often industry-wide, developments. For example, listeners frustrated with poor quality transmission of their favorite programs have an incentive to install higher-speed cable or DSL Internet connections.<sup>33</sup> Webcasting is also a new outlet for advertising.<sup>34</sup> Eighty-two percent of webcasters now sell advertising time.<sup>35</sup> Additionally, software developers create new products to help users better manage and listen to Internet radio.<sup>36</sup> For example, the SonicBox allows listeners to hear Internet radio without sitting at a computer to do so.<sup>37</sup> In these ways, issues surrounding Internet radio not only affect the obvious stakeholders, such as webcasters,

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<sup>31</sup> Jon Healey, *Congress Close to Approving Webcast Royalties Measure*, LOS ANGELES TIMES, Nov. 15, 2002.

<sup>32</sup> Survey data confirms the importance of variety. Sixty percent of Internet radio listeners choose to listen because “it provides audio content you cannot get otherwise.” FITZGERALD AND ROSIN, *supra* note 9, at 23. When asked “How important is this item when selecting a site to listen to Internet audio?” listeners rated the ability to listen to specific types of music as being most important, access to a wide variety of audio second most important, and access to audio not available elsewhere as number three. *Id.*

<sup>33</sup> Explains the Radio Enthusiast website, “Another rule of thumb: if you have access to, and can afford a broadband connection such as cable or digital subscriber line (DSL), and are serious about internet radio, get it. Though not perfect, broadband connections are far, far superior for internet radio than dial-up modem access.” James, *supra* note 28.

<sup>34</sup> ARBITRON, INC., WEBCASTERS “SPEAK OUT!,” 3 (2001), at <http://www.arbitron.com/downloads/webcastersspeakout.pdf> (on file with the North Carolina Journal of Law & Technology).

<sup>35</sup> *Id.*

<sup>36</sup> For example, the new TerraPlayer wireless Digital Audio Jukebox supports streaming Internet radio and allows listeners to hear traditional radio, as well. *TerraDigital Systems(TM) LLC Debuts Wireless Digital Audio Jukebox(TM) At Prestigious DEMO 2003 Event*, PR NEWswire, Feb. 16, 2003.

<sup>37</sup> Carl Lindemann, *Internet Radio to Go*, BROADCASTING & CABLE, Dec. 11, 2000, at [http://www.broadcastingcable.com/index.asp?layout=story\\_stocks&articleid=C A54944](http://www.broadcastingcable.com/index.asp?layout=story_stocks&articleid=C A54944) (on file with the North Carolina Journal of Law & Technology).

listeners, and the music industry, but also Internet service providers, software developers, and other technology companies.

## II. Regulation of Radio

### A. Regulation of Traditional Radio Stations

Radio was not yet popular when the first Copyright Act was passed in 1909.<sup>38</sup> The Copyright Act of 1909 recognized copyrights for music,<sup>39</sup> and shortly after its enactment, a concerned group of musicians formed the ASCAP as a royalty collection society.<sup>40</sup> In compliance with the Copyright Act, music halls, theatres, and other public venues paid royalties to the composers whose records they played.<sup>41</sup> However, while early radio stations paid royalties for the copies of records they purchased, they did not pay any additional royalties to broadcast those records.<sup>42</sup> As a

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<sup>38</sup> See *Radio: Development of Radio Technology*, COLUMBIA ENCYCLOPEDIA, (6th ed. 2003), at [http://www.encyclopedia.com/html/section/radio\\_developmentofradiotechnology.asp](http://www.encyclopedia.com/html/section/radio_developmentofradiotechnology.asp) (on file with the North Carolina Journal of Law & Technology). Lee De Forest, "the father of radio," did not invent the Audion vacuum tube until 1907. See *Lee De Forest*, COLUMBIA ENCYCLOPEDIA, (6th ed. 2003), <http://www.encyclopedia.com/html/D/DeForestLI.asp> (on file with the North Carolina Journal of Law & Technology). The tube made live broadcast of radio signals possible for the first time. *Id.*

<sup>39</sup> The Copyright Act of 1909 granted protection for two elements of recorded music; the song as created by the writer, the "musical composition," and the actual recording of the song by the artist, the "sound recording." I. Fred Koenigsberg, David E. Case, and Stefan Mentzer, *Music, the Internet, and the Music Industry*, in 1 MUSIC ON THE INTERNET: UNDERSTANDING THE NEW RIGHTS & SOLVING NEW PROBLEMS (Anthony V. Lupo and Mark F. Radcliffe ed., Practising Law Institute 2001). See 60 P.L. 349 § 26 (1909). At that time, music was afforded copyright protection once it was written or printed in a visual format, such as sheet music. See *White-Smith Music Co. v. Apollo Co.*, 209 U.S. 1 (1908). The "White-Smith doctrine" was a strong component of the Copyright Act of 1909. DAVID NIMMER, NIMMER ON COPYRIGHT § 2.05[A] (2002).

<sup>40</sup> See ASCAP, FIRST ASCAP MEMBERSHIP MEETING HELD 85 YEARS AGO IN 1914 (1999), at <http://www.ascap.com/playback/1999/may/headlines.html> (on file with the North Carolina Journal of Law & Technology).

<sup>41</sup> See EDWARD SAMUELS, ILLUSTRATED STORY OF COPYRIGHT, 2002, 41-43.

<sup>42</sup> See *id.*



result, the number of radio stations ballooned, while the number of record companies fell dramatically.<sup>43</sup> Around the same time, *Billboard Magazine* and ASCAP led the push to force radio stations to pay royalties for the right to transmit music.<sup>44</sup> In the 1920s, composer Victor Herbert sued a restaurant for playing his hit operetta song just down the street from where his show was performed.<sup>45</sup> A series of similar claims followed and, in 1922, ASCAP began collecting a \$250 licensing fee from radio stations.<sup>46</sup> While the exact amount of the fee varied, radio continued to develop under this same royalty scheme for nearly fifty years.<sup>47</sup>

In 1972, the Copyright Act of 1906 was amended to provide sound recording copyright holders protection once a work is put into a "tangible medium of expression."<sup>48</sup> In 1976, the legislature again amended the Copyright Act to require radio stations to pay royalties to the person owning the underlying musical composition, who usually is not the song's performer.<sup>49</sup>

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<sup>43</sup> See *id.* "The frailty of record firms was matched by their declining output, with the total value of production plummeting from \$105.6 million in 1921 to \$5.5 million in 1933. Concurrently, radio mostly enjoyed growth; its annual advertising earnings went from less than \$5 million to \$57 million." Timothy Dowd, *The Napster Episode*, 4 SOUNDCAPES (Apr. 2001), at [http://www.icce.rug.nl/~soundscapes/VOLUME04/Napster\\_episode.html](http://www.icce.rug.nl/~soundscapes/VOLUME04/Napster_episode.html) (on file with the North Carolina Journal of Law & Technology).

<sup>44</sup> See SAMUELS at 40–41.

<sup>45</sup> Andrew Petkofsky, *Copyright Law Adequate*, *W&M Professor Says*, THE RICHMOND TIMES DISPATCH, July 23, 1998, at B1.

<sup>46</sup> SAMUELS at 43.

<sup>47</sup> *Id.*

<sup>48</sup> 17 U.S.C. § 101 (2001). Copyright holders receive the following six rights: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work... (4) ... to perform the copyrighted work publicly; (5) ... to display the copyrighted work publicly; and (6) ... to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 106(1)-(6) (2001).

<sup>49</sup> Copyright holders' rights "do not include . . . [a] right of performance under section 106(4)." 17 U.S.C. § 114 (1976).

Radio stations did not pay artists a "performance royalty" under the 1976 Act because there were no performance rights for sound recordings at the time and legislators believed playing songs promoted record sales.<sup>50</sup>

## **B. Regulation of Internet Radio Stations**

### **1. The Digital Performance Right in Sound Recordings Act**

In 1995, Congress addressed the issue of public performance rights in music for the first, but only for the digital transfer of music.<sup>51</sup> Representatives of the music community had alerted Congress to the growth in the use of digital technologies among listeners with high quality, recordable copies of copyrighted works.<sup>52</sup> The representatives expressed concern about the adverse effects such technology had on the sale of tapes and CDs and the "[erosion of] copyright owners' ability to control and be paid for the use of their work."<sup>53</sup> Congress enacted the Digital Performance Right in Sound Recordings Act ("DPRA") as a way to balance these industry interests with those of the technology sector. The goal of DPRA was to

... provide copyright holders of sound recordings with the ability to control the distribution of their product by digital transmissions, without hampering the arrival of new technologies, and without imposing new and unreasonable burdens on radio and television broadcasters, which often promote, and appear to pose no threat to, the distribution of sound recordings.<sup>54</sup>

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<sup>50</sup> See Marc Jacobson, *Final Decision of the Copyright Arbitration Royalty Panel on Webcasting Royalties*, CYBERSPACE LAWYER, July/Aug. 2002, at 11, available at <http://www.cyberspacelawyerreport.com/cyberspacelawyerreport/>.

<sup>51</sup> See Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 350.

<sup>52</sup> *Public Performance of Sound Recordings: Definition of a Service*, 65 Fed. Reg. 77,292 (Dec. 11, 2000) (citing S. REP. NO. 104-128, at 14 (1995)).

<sup>53</sup> *Id.* (citing S. REP. NO. 104-128, at 15 (1995)).

<sup>54</sup> *Id.*

Though DPRA did not specifically address Internet radio technology,<sup>55</sup> which had not yet become popular, it did contain provisions that shape current webcasting law. DPRA amended the Copyright Act of 1976 to extend a limited public performance right to sound recordings,<sup>56</sup> meaning that the owner of the copyright in the sound recording would receive royalty payments for the first time. Under DPRA, webcasters who charge listeners for their services,<sup>57</sup> but not traditional or public radio stations,<sup>58</sup> were required to pay performance right royalties.<sup>59</sup> DPRA distinguished between webcasters who charge their listeners and those who do not<sup>60</sup> since many of the subscription services allow listeners to choose the programs they want to download, making them easier to copy illegally. DPRA did not set a royalty rate;<sup>61</sup> instead, the Act left it to webcasters and record companies to negotiate rates between themselves. When they could not reach an agreement, DPRA provided that the U.S. Copyright Office would convene an arbitration panel, called a CARP, to determine the rate.<sup>62</sup>

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<sup>55</sup> 148 CONG. REC. H7043 (daily ed. Oct. 7, 2002) (statement of Rep. Sensenbrenner).

<sup>56</sup> 17 U.S.C. § 106(6) (2001).

<sup>57</sup> DPRA distinguished between digital subscription services and nonsubscription transmissions like streaming Internet radio. DPRA requires webcasters of "nonexempt, noninteractive, digital subscription transmissions" to obtain a license. 17 U.S.C. § 114(f) (1995). Nonsubscription services are exempt. 17 U.S.C. § 114(d)(1)(A)(i)-(iii) (1995). After DPRA's passage, the scope of these exemptions was a common subject of debate. Public Performance of Sound Recordings: Definition of a Service, 65 Fed. Reg. 77,292 (Dec. 11, 2002) (to be codified at 37 C.F.R. pt. 201) (citing Reply Comments of the National Association of Broadcasters at 9-12 (dated June 20, 1997), submitted in Docket No. RM 97-1).

<sup>58</sup> 17 U.S.C. § 114(d) (2001).

<sup>59</sup> *Id.*

<sup>60</sup> See Digital Performance Right in Sound Recordings Act, Pub. L. No. 104-39, 109 Stat. 366 (Nov. 1, 1995).

<sup>61</sup> See Public Performance of Sound Recordings: Definition of a Service, 65 Fed. Reg. 77,292 (Dec. 11, 2002) (to be codified at 37 C.F.R. pt. 201).

<sup>62</sup> *Id.* at 77,294.

## 2. Digital Millennium Copyright Act

By 1998, it had become clear that DPRA left many of the issues surrounding Internet radio and royalty rates unsettled. That year, Congress focused on clarifying how copyright law would apply to streaming Internet radio broadcasts.<sup>63</sup> Internet-only webcasters argued that the law should treat them like traditional radio stations that simulcast and require them to pay only an annual license fee to ASCAP and BMI for the copyright in the musical composition, and not an additional performance royalty.<sup>64</sup> The record industry, however, continued to push for the inclusion of all webcasters under DPRA.<sup>65</sup>

In an effort to solve this disagreement, Congress again amended the Copyright Act of 1976. The Digital Millennium Copyright Act ("DMCA") extended the DPRA performance right to webcasters who do not charge their listeners subscription fees and to traditional radio stations' "simulcasts," the Internet arm of their on-air broadcasts.<sup>66</sup> In addition, DMCA sought to make establishing royalty rates easier by authorizing eligible webcasters to accept a compulsory license.<sup>67</sup> Compulsory licenses enable webcasters to pay one industry-negotiated or government-mandated rate to operate without negotiating individual licenses in the marketplace.<sup>68</sup> To become eligible for a license under DMCA,

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<sup>63</sup> *Id.* at 77,296.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> 17 U.S.C. § 114(j)(6) (2001). Radio stations continued to fight application of the DMCA to their simulcasts after passage of the Act. For example, in response to a Recording Industry Association of America (RIAA) petition on March 1, 2000, the Copyright Office initiated a rulemaking proceeding to determine whether traditional radio "simulcasts" are covered by the digital performance right. The United States District Court for the Eastern District of Pennsylvania held that they are included. *Bonneville Int'l Corp. v. Peters*, 153 F. Supp. 2d 763, 765 (E.D. Pa. 2001). For a discussion of the *Bonneville* decision, read Raffi Zerounian, *I. Intellectual Property: A. Copyright: 1. Digital Media: c) Internet Broadcasting: Bonneville International v. Peters*, 17 BERKELEY TECH. L.J. 47 (2002).

<sup>67</sup> See 17 U.S.C. § 144(d) (2001). After DPRA, webcasters still were having trouble negotiating their own royalty rates. See *id.*

<sup>68</sup> See 17 U.S.C. § 144(f) (2001).

webcasters must meet thirteen requirements.<sup>69</sup> Webcasters that fail to meet those thirteen criteria must either negotiate royalty rates

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(1) . . . a webcaster may not play in any three-hour period. . . more than three songs from a particular album, including no more than two consecutively, or. . . four songs by a featured artist or from a boxed set, including no more than three consecutively. (2). . . Programs that are posted on a web site for listeners to hear repeatedly on-demand should be at least five hours long, and should not be available for more than two weeks at a time. . . (3). . . Programs that automatically start over when finished should be at least three hours long. (4). . . Rebroadcasts. . . can be performed at scheduled times three times in a two-week period for programs of less than one hour, and four times in a two-week period for programs of an hour or more. (5). . . Advance song or artist playlists generally may not be published. . . (6) . . . [A] webcaster must identify the sound recording, the album and the featured artist. . . (7). . . A webcaster may not perform a sound recording in a way that falsely suggests a connection between the copyright owner or recording artist and a particular product or service. (8). . . A webcaster must disable copying. . . if in possession of the technology to do so, and must also take care not to induce or encourage copying. . . (9). . . A webcaster must accommodate. . . measures widely used by sound recording copyright owners to identify or protect copyrighted works. To the extent it is technically feasible, transmissions must be set so that receiving software will inhibit the end user from direct digital copying of the transmitted data. (10). . . A webcaster must cooperate with copyright owners to prevent recipients from using devices that scan transmissions for particular recordings or artists. (11). . . The. . . license is limited to transmissions made from lawful copies of sound recordings. . . [and] does not cover. . . bootlegs. . . (12). . . The webcaster must not automatically and intentionally cause a. . . switch from one program channel to another. . . [and] (13). . . If technically feasible, transmissions by the webcaster must be accompanied by the information encoded in the sound recording by the copyright owner. . . .

with individual record labels or pay standard rates set by the Copyright Office.<sup>70</sup>

### 3. Setting a Royalty Rate under the Digital Millennium Copyright Act

After passage of the DMCA, the U.S. Copyright Office began the process of setting royalty rates for those webcasters unable to negotiate their own payments.<sup>71</sup> Under the direction of the Librarian of Congress, the Copyright Office first gave webcasters and record companies an opportunity to negotiate their own royalties.<sup>72</sup> Record companies suggested fifteen percent of the webcasters' total revenues, while webcasters offered to redirect three percent of the revenues they already paid ASCAP and BMI.<sup>73</sup>

During the Copyright Office's royalty rate setting process, Yahoo Inc., one of the largest Internet radio broadcasters, managed to negotiate its own royalty rate agreement<sup>74</sup> with the Recording Industry Association of America ("RIAA").<sup>75</sup> For the majority of

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Richard Rose, *Connecting the Dots: Navigating Requirements of the Internet Music Revolution*, 42 IDEA 313, 333–34 (2002).

<sup>70</sup> *Id.* at 333.

<sup>71</sup> See *The Hopes & Hurdles Of The Web - Webcasters, Labels Still Debating Licenses*, BILLBOARD, Nov. 6, 1999.

<sup>72</sup> *Id.*

<sup>73</sup> Stanley A. Miller, *Internet's Music Sites Hit a Sour Note; Signing off?*, MILWAUKEE JOURNAL SENTINEL, Apr. 23, 2002, at 4E.

The RIAA/Yahoo! agreement provided for a lump sum payment of \$1.25 million for the first 1.5 billion transmissions. . . For transmissions after the first 1.5 billion transmissions, the RIAA/Yahoo! agreement provided for two per-performance rates: a relatively high rate for Internet-only performances and a relatively low rate for radio retransmissions. . .

<sup>74</sup> U.S. COPYRIGHT OFFICE, SUMMARY OF THE DETERMINATION OF THE LIBRARIAN OF CONGRESS ON RATES AND TERMS FOR WEBCASTING AND EPHEMERAL RECORDINGS (Jan. 8, 2003), *available at* [http://www.copyright.gov/carp/webcasting\\_rates\\_final.html](http://www.copyright.gov/carp/webcasting_rates_final.html) (on file with the North Carolina Journal of Law & Technology).

<sup>75</sup> RIAA is the 22<sup>nd</sup> largest lobby in Washington and led the push to stop Napster in a highly publicized debate. The RIAA suit even made the cover of *Billboard*

webcasters, however, negotiation attempts failed.<sup>76</sup> To help the webcasters unable to negotiate their own rates, the U.S. Copyright Office intervened by forming a CARP with three arbitrators to determine the royalty rate for webcasters.<sup>77</sup> As required by the Copyright Act, the arbitrators based their rate decision on a “willing buyer/willing seller” theory, looking at the “best evidence of the marketplace rate for webcasting.”<sup>78</sup> The only available example of a willing buyer and seller in Internet radio, however, was the Yahoo settlement.<sup>79</sup> As a result, CARP based its royalty rates primarily on that settlement, negotiated by a webcaster much too large to represent the interests of many in the Internet radio community.<sup>80</sup>

The CARP issued its decision on February 20, 2002,<sup>81</sup> calling for webcasters to pay 0.14¢ per song per listener and

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*Magazine* on December 18, 1999. Profile Publ'g & Mgmt. Corp. APS v. Musicmaker.com, Inc., 2003 U.S. Dist. LEXIS 991, 4 (2003).

<sup>76</sup> Jonathan Allen, *Of Royalties and Rancor: Recent Webcasting Developments*, CYBERSPACE LAWYER, Sept. 2002, at 15.

<sup>77</sup> Since October 19, 1976, the Librarian of Congress has had the power to convene copyright arbitration royalty panels to set royalty rates under 17 U.S.C. § 801. See 17 U.S.C. § 801(a) (2001). The arbitration panels set royalty rates in accordance with the following goals:

[t]o maximize the availability of creative works to the public; [t]o afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions; [t]o reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication; [and t]o minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

17 U.S.C. § 801(b)(1)(A)-(D) (2001).

<sup>78</sup> U.S. COPYRIGHT OFFICE, *supra* note 74.

<sup>79</sup> *Id.*

<sup>80</sup> Allen, *supra* note 76.

<sup>81</sup> U.S. COPYRIGHT OFFICE, RATES AND TERMS FOR STATUTORY LICENSE FOR ELIGIBLE NONSUBSCRIPTION SERVICES, (Jan. 13, 2003) at

traditional radio stations simulcasting over the Internet to pay 0.07¢ per song per listener.<sup>82</sup> Noncommercial webcasters such as college radio stations, with the exclusion of public radio stations, were asked to pay 0.02¢.<sup>83</sup> Copyright holders in the recording industry thought the rate was too low,<sup>84</sup> and webcasters thought it was too high.<sup>85</sup> At a Senate Judiciary Committee hearing, the radio industry requested that webcasters pay rates tied to their revenues, rather than on a per song, per listener basis.<sup>86</sup> Webcasters claimed the CARP rates would bankrupt them.<sup>87</sup> All parties appealed the decision.<sup>88</sup>

On May 21, 2002, the Librarian of Congress rejected the CARP recommendation.<sup>89</sup> Instead, on June 20, 2002, he issued a revised determination that became an official order on July 8, 2002.<sup>90</sup> The Librarian's order specified new rates that would go into effect on October 20, 2002 and would be retroactive to the 1998 passage of the DMCA.<sup>91</sup> Although the order lowered the

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[http://www.copyright.gov/carp/webcasting\\_rates.html](http://www.copyright.gov/carp/webcasting_rates.html) (on file with the North Carolina Journal of Law & Technology).

<sup>82</sup> U.S. COPYRIGHT OFFICE, *supra* note 74.

<sup>83</sup> *Id.*

<sup>84</sup> 148 CONG. REC. H7046 (daily ed. Oct. 7, 2002) (statement of Rep. Sensenbrenner).

<sup>85</sup> While those rates may not sound high, 0.14¢ is ten times what webcasters had requested. For example, the University of North Carolina college radio station WXYC-FM has a \$17,400 annual budget. Interview with Jason Perlmutter, Station Manager, WXYC-FM, University of North Carolina at Chapel Hill (Mar. 5, 2003). If WXYC-FM played twelve songs per hour for thirty listeners, the station would owe 0.84¢ per hour, or \$7,358 per year. That amount is over half the station's budget. *Id.* Larger webcast Radio Paradise would owe about \$10,000 per month, one-third of the station's revenue, and a one-time retroactive royalty payment of about \$175,000, or just under half its annual revenue. David Brancaccio, *Battle in Congress over Small Webcasters Amendment Act*, MARKETPLACE (Minnesota Public Radio Oct. 17, 2002).

<sup>86</sup> See 148 CONG. REC. S11,138 (daily ed. Nov. 14, 2002) (statement of Sen. Leahy).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> U.S. COPYRIGHT OFFICE, *supra* note 81.

<sup>90</sup> *Id.*

<sup>91</sup> U.S. COPYRIGHT OFFICE, DETERMINATION OF REASONABLE RATES AND TERMS FOR THE DIGITAL PERFORMANCE OF SOUND RECORDINGS AND EPHEMERAL RECORDINGS; FINAL RULE, 67 Fed. Reg. 45,239 (July 8, 2002) (to



royalty rates to 0.07¢ for both Internet radio webcasts and traditional stations broadcasting online,<sup>92</sup> parties on both sides were unhappy.<sup>93</sup> Copyright holders claimed the lower rate did not reflect a fair market standard,<sup>94</sup> while many webcasters still believed that the rate was excessive.<sup>95</sup> Some Internet radio stations, including KPG, the nation's oldest Internet radio station, ceased broadcasting immediately after the CARP order in fear they would not be able to afford the new royalty rates.<sup>96</sup> Other stations, worried that the retroactive payment of four years' royalty rates would put them out of business,<sup>97</sup> sought help from Congress.

### C. Legislation in the 107<sup>th</sup> Congress

#### 1. Internet Radio Fairness Act

As webcasters nervously watched the October payment deadline approach, Representative Jay Inslee (D-WA) introduced IRFA on July 26, 2002.<sup>98</sup> This was the first bill in the 107th Congress to address the Internet radio royalty issue. IRFA had several provisions to protect small webcasters.<sup>99</sup> For instance, the Bill exempted a "small business, small organization, or small governmental jurisdiction" from paying the royalty rates set earlier

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be codified at 37 C.F.R. pt. 261), *available at* <http://www.copyright.gov/fedreg/2002/67fr45239.html>.

<sup>92</sup> U.S. COPYRIGHT OFFICE, *supra* note 74.

<sup>93</sup> Harvard law professor William Fisher explains that the CARP rates "pleased no one." *Watermarks, Tax Should Replace Copyright Law, Panelist Says*, 4 WASHINGTON INTERNET DAILY, (Jan. 7, 2003).

<sup>94</sup> 148 CONG. REC. H7046 (daily ed. Oct. 7, 2002) (statement of Rep. Sensenbrenner).

<sup>95</sup> *Id.*

<sup>96</sup> See, e.g., *Without Congress' Help, Internet Radio Will Wither*, THE MERCURY NEWS, Apr. 17, 2002.

<sup>97</sup> 148 CONG. REC. S11,138 (statement of Sen. Leahy).

<sup>98</sup> See H.R. 5285, 107th Cong. (2002).

<sup>99</sup> In addition to those described in the text, IRFA would have allowed nonsubscription webcasters to make ephemeral recordings "if: (A) retained and used solely by the transmitting organization that made it; and (B) used solely for the purpose of making the transmitting organization's own transmissions or for purposes of archival preservation or security." *Id.*

by the Librarian of Congress<sup>100</sup> and required a CARP to establish lower royalty rates for small entities.<sup>101</sup> Immediately upon its introduction, the Bill was referred to the House Committee on the Judiciary.<sup>102</sup>

IRFA garnered great support. For example, webcasters and other interested members of the public participated in a Washington, D.C. march in support of IRFA.<sup>103</sup> Less than three months after introduction of the Bill, forty-one representatives had joined as cosponsors.<sup>104</sup>

## 2. Small Webcaster Amendments Act

While IRFA was still in committee, Representative James Sensenbrenner (R-WI) proposed the Small Webcaster Amendments Act of 2002 ("SWAA") on September 26, 2002. SWAA was short and simple.<sup>105</sup> To allow webcasters and copyright holders additional time to negotiate, it proposed placing a six-month moratorium on the Librarian of Congress's July royalty rate decision.<sup>106</sup>

A few days later, thirteen webcasters, the "Sensenbrenner Thirteen," entered Sensenbrenner's office to negotiate with the RIAA.<sup>107</sup> At first, the negotiations did not produce rates

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> On August 20, 2002, IRFA was referred to the Senate Judiciary Committee Subcommittee on Courts, the Internet, and Intellectual Property. *Id.*

<sup>103</sup> Ann Gabriel, *American Injustice*, WEBCASTER ALLIANCE, at <http://www.webcasteralliance.com/modules/sections/index.php?op=viewarticle&artid=2> (on file with the North Carolina Journal of Law & Technology).

<sup>104</sup> See H.R. 5285, 107th Cong. (2002).

<sup>105</sup> The original bill was just two paragraphs long. Clea Simpson, *Radio Tracks: Small Webcasters Hope Royalties Decision Will not Shut them Down*, THE BOSTON GLOBE, Oct. 17, 2002, at E12.

<sup>106</sup> Phil Hardy, *Compromise Rate Agreed to Save Small US Webcasters*, MUSIC & COPYRIGHT, Oct. 16, 2002.

<sup>107</sup> Healey, *supra* note 31. The negotiation team, the "Sensenbrenner Thirteen," included Kevin Shively of [www.Beethoven.com](http://www.Beethoven.com), Wanda and Jim Atkinson of [www.3wk.com](http://www.3wk.com), Gary Dobek of [www.DigitallyImported.com](http://www.DigitallyImported.com), Bill Goldsmith of [www.RadioParadise.com](http://www.RadioParadise.com), Mike Hays of [www.Twangcast.com](http://www.Twangcast.com), Dave Landis of [www.Ultimate-80s.com](http://www.Ultimate-80s.com), Mary McCann of [www.iMNetworks.com](http://www.iMNetworks.com), Bob

acceptable to the parties involved.<sup>108</sup> Eventually, however, there was a breakthrough and Sensenbrenner's office rewrote SWAA to reflect the terms of the private agreement.<sup>109</sup> The simple one paragraph bill, which provided a general moratorium, grew to over thirty pages in length and imposed royalty rates.<sup>110</sup> The newest version of SWAA required webcasters to pay royalties as a percentage of their revenues, rather than on the per song, per listener basis the Librarian of Congress had ordered.<sup>111</sup>

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Ottoway of [www.ClassicalMusicDetroit.com](http://www.ClassicalMusicDetroit.com), Mike Roe of [www.radioio.com](http://www.radioio.com), Ron Rubin of [www.BoomerRadio.com](http://www.BoomerRadio.com), Steve Wolf of [www.Wolffm.com](http://www.Wolffm.com), and a representative from [www.OnionRiverRadio.com](http://www.OnionRiverRadio.com). Gabriel, *supra* note 103.

<sup>108</sup> Telephone interview with Mike Roe, Webcaster, Radioio.com (Feb. 2, 2003). Roe is founder and head of the Internet radio station Radioio.com and was a member of the Sensenbrenner Thirteen involved in negotiations with the record industry. *Id.* Senator Leahy also described the negotiations by saying "Reports on the progress of these negotiations were disappointing. . . ." 148 CONG. REC. S11,139 (daily ed. Nov. 14, 2002) (statement of Sen. Leahy).

<sup>109</sup> Sensenbrenner explained on the House floor, "Since last week, the parties have negotiated around the clock. They have now arrived at a deal that sets new rates and payment terms that will obviate the need for further legal and administrative intervention. The manager's amendment simply codifies the terms of that deal." 148 CONG. REC. H7047 (daily ed. Oct. 7, 2002) (statement of Rep. Sensenbrenner).

<sup>110</sup> Simpson, *supra* note 105, at E12.

<sup>111</sup> 148 CONG. REC. H7048 (daily ed. Oct. 7, 2002) (statement of Rep. Berman). The terms of the agreement were as follows:

In 2003 and 2004, small webcasters will pay the greater of 10 percent of their gross revenues under \$250,000 and 12 percent of their gross revenues over \$250,000, or 7 percent of expenses. The criteria for eligibility as a small webcaster are reasonable and allow such webcasters to grow and yet still obtain the royalty discount provided by the legislation. A webcaster will be eligible for the discounted royalty rate for the past 4 years if it had less than \$1 million in gross revenues over those four years. A webcaster will be eligible in the year 2003 if it has gross revenues under \$500,000 for that calendar year and in 2004 if it has gross revenues under \$1.25 million.

*Id.* In addition, "after deductions, record companies will receive 50 percent of the royalty, artists will receive 45 percent of the direct royalty payments, and the rest is distributed to nonfeatured musicians and vocalists. 148 CONG. REC. H7048 (daily ed. Oct. 7, 2002) (statement of Rep. McCarthy).

Both the webcasters involved in negotiations and the recording industry seemed pleased with the specific rates included in SWAA.<sup>112</sup> In addition, the agreement provided that webcasters would pay royalties to artists more directly than under other plans, which gained artists' support for the first time during the royalty debates.<sup>113</sup> On October 7, 2002, Sensenbrenner moved quickly to pass SWAA, making a motion to break with ordinary legislative procedure and immediately pass his latest version of the bill.<sup>114</sup> The motion passed and SWAA was approved by the House just thirteen days before webcasters were scheduled to pay four years of royalties.<sup>115</sup> While the terms of SWAA were amenable to those involved in their negotiations, the smallest webcasters remained unhappy, still fearing the rates would put them out of business.<sup>116</sup>

### 3. Small Webcaster Settlement Act

The day following passage of SWAA in the House, the Act was introduced in the Senate.<sup>117</sup> On the day scheduled for SWAA debate, Senator Jesse Helms (R-NC) stopped consideration of the thirty page Sensenbrenner version of SWAA by introducing his

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<sup>112</sup> 148 CONG. REC. H7047 (daily ed. Oct. 7, 2002) (statement of Rep. Sensenbrenner).

<sup>113</sup> See *id.* (stating the "American Federation of Radio and Television Artists, the American Federation of Musicians, the Screen Actor's Guild and the AFL-CIO are supportive of this legislation").

<sup>114</sup> Sensenbrenner moved "to suspend for a period of 6 months the determination of the Librarian of Congress of July 8, 2002, relating to rates and terms for the digital performance of sound recordings and ephemeral recordings, as amended." 148 CONG. REC. H7047 (daily ed. Oct. 7, 2002) (statement of Rep. Sensenbrenner). Members of the House were given five days in which they could comment on the Act. *Id.*

<sup>115</sup> Webcasters were scheduled to pay royalties on October 20, 2002 and SWAA passed on October 7, 2002. 148 CONG. REC. H7046 (daily ed. Oct. 7, 2002).

<sup>116</sup> Healey, *supra* note 31. Although the Act tied royalty payments to revenue, it included provisions for minimum payments, below which no webcaster could fall. Minimum payments "assure that copyright owners and artists receive some payment for performance of their music. . . ." 148 CONG. REC. S11,139 (daily ed. Nov. 14, 2002) (statement of Sen. Leahy).

<sup>117</sup> 148 CONG. REC. S11,138 (daily ed. Nov. 14, 2002).

own amendment.<sup>118</sup> The Helms Amendment altered SWAA by reintroducing the idea of private negotiations.<sup>119</sup> The Helms Amendment gave SoundExchange, the division of RIAA responsible for collecting royalties, the authority to negotiate royalty rates with small webcasters.<sup>120</sup>

Additionally, the Helms Amendment divided webcasters into two classes: noncommercial webcasters, including public and college Internet radio stations, and small commercial webcasters,

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<sup>118</sup> According to some reports, Senator Helms became involved in the Internet royalty rate issue in order to protect small, religious webcasters. See, e.g., Bill Holland, *Lame Duck Congress Passes Small-Webcaster Royalty Rate Bill*, BILLBOARD, Nov. 30, 2002, at 9. In an October 21, 2002 letter, Senator Helms stated

Dear Friends, Thanks for letting me know of your opposition to the so-called "webcasting" bill (HR 5469) currently pending in the Senate. I agree that this bill is dangerous for the fledgling internet broadcasting industry, and I am deeply concerned that small webcasters will not be able to remain viable if the royalties proscribed under this legislation take effect. Like many of my colleagues, I was appalled at the outcome of arbitration before the Library of Congress, which set royalty payments at an exorbitantly high rate. I supported the original incarnation of HR 5469, which placed a six-month moratorium on the bill taking effect. Unfortunately, the recording industry was able to convince House leaders to replace this moratorium with a far-ranging rate structure it negotiated with a small fraction of disadvantaged webcasters. The resulting bill threatens the future of many small webcasters whose views were never considered during the negotiation process. I certainly hope that a solution can be found that is fair for the recording industry, the artists it represents, and the hard-working entrepreneurs that make up the webcasting industry. Thank You,  
Senator Jesse Helms.

Letter from Jesse Helms, Senator from North Carolina (Oct. 21, 2002), at <http://www.ruf.rice.edu/~willr/cb/sos/hletter.shtml> (on file with the North Carolina Journal of Law & Technology).

<sup>119</sup> S. Amend. 4955, 107th Cong. §5 (2002).

<sup>120</sup> *Id.*

including traditional Internet radio stations.<sup>121</sup> Noncommercial stations were given until June 20, 2003 and small commercial webcasters until December 15, 2003 to negotiate royalty rates.<sup>122</sup> The Helms Amendment obligated the Copyright Office to publish in the Federal Register any royalty agreements negotiated by webcasters and the recording industry.<sup>123</sup> Should negotiations fail,

<sup>121</sup> Noncommercial webcaster

means a webcaster that. . . (I) is exempt from taxation under section 501 of the Internal Revenue Code of 1986 (26 U.S.C. 501); (II) has applied in good faith to the Internal Revenue Service for exemption from taxation under section 501 of the Internal Revenue Code and has a commercially reasonable expectation that such exemption shall be granted; or (III) is operated by a State or possession or any governmental entity or subordinate thereof, or by the United States or District of Columbia, for exclusively public purposes.

S. Amend. 4955 § 4(E)(i)(I)-(III).

<sup>122</sup> S. Amend. 4955 § 3.

<sup>123</sup> See S. Amend. 4955. The Helms amendment also added Congressional findings to the bill, specifying legislative intent.

Congress finds the following: (1) Some small webcasters who did not participate in the copyright arbitration royalty panel proceeding leading to the July 8, 2002 order of the Librarian of Congress establishing rates and terms for certain digital performances and ephemeral reproductions of sound recordings. . . have expressed reservations about the fee structure set forth in such order, and have expressed their desire for a fee based on a percentage of revenue. (2) Congress has strongly encouraged representatives of copyright owners of sound recordings and representatives of the small webcasters to engage in negotiations to arrive at an agreement that would include a fee based on a percentage of revenue. (3) The representatives have arrived at an agreement that they can accept in the extraordinary and unique circumstances here presented, specifically as to the small webcasters, their belief in their inability to pay the fees due pursuant to the July 8 order, and as to the copyright owners of sound recordings and performers, the strong encouragement of Congress to reach an

the Helms Amendment provided that webcasters would make the royalty payments outlined by the Librarian of Congress in his July decision.<sup>124</sup>

Facing impending payment deadlines, a number of interested parties supported the Helms Amendment, including the “record industry, artist representatives, large webcasters, small webcasters, college radio representatives, and religious broadcasters.”<sup>125</sup> By the following day, both houses of Congress had unanimously passed Helms’ amended version of SWAA as the SWSA of 2002.<sup>126</sup> President Bush signed SWSA into law on December 4, 2002.<sup>127</sup>

#### **D. Developments Since the 107th Congress**

Under SWSA, webcasters must either negotiate their own royalty rates or pay the rates the Librarian of Congress set in the

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accommodation with the small webcasters on an expedited basis. (4) The representatives have indicated that they do not believe the agreement provides for or in any way approximates fair or reasonable royalty rates and terms, or rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller. (5) Congress has made no determination as to whether the agreement provides for or in any way approximates fair or reasonable fees and terms. . . (6) Congress likewise has made no determination as to whether the July 8 order is reasonable or arbitrary. . . (7) It is, nevertheless, in the public interest for the parties to be able to enter into such an agreement without fear of liability for deviating from the fees and terms of the July 8 order. . . .

S. Amend. 4955. In addition, the amendment required the Comptroller General and Register of Copyrights to conduct a survey of privately negotiated royalty agreements by June 1, 2004. S. Amend. 4955 § 6.

<sup>124</sup> See S. Amend. 4955.

<sup>125</sup> *Congress Resolves Webcasters Royalty Debate*, INTERNETNEWS.COM, Nov. 15, 2002, at <http://www.internetnews.com/bus-news/article.php/1501421> (on file with the North Carolina Journal of Law & Technology).

<sup>126</sup> 148 CONG. REC. H8996 (daily ed. Nov. 14, 2002).

<sup>127</sup> Small Webcasters Settlements Act, Pub. L. No. 107-321 (Dec. 4, 2002) (to be codified in scattered sections of 17 U.S.C.).

controversial July order.<sup>128</sup> Immediately after SWSA, most larger webcasters refrained from praising or criticizing the new law and instead adopted a “wait and see” approach.<sup>129</sup> On December 13, 2002, SoundExchange and the Voice of Webcasters, which is made up of many of the same webcasters who negotiated with the RIAA in Sensenbrenner’s office,<sup>130</sup> notified the Copyright Office of a negotiated agreement.<sup>131</sup> The Copyright Office published the terms of that agreement two weeks later.<sup>132</sup>

The SoundExchange/Voice of Webcasters agreement provides that webcasters pay either 8% of gross revenues or 5% of expenses, whichever is greater, for the period of time just after the enactment of DMCA through 2002.<sup>133</sup> For the years 2003 and 2004, webcasters pay either 10% of the first \$250,000 in revenues and 12% of gross revenues above that amount or 7% of expenses, whichever is higher.<sup>134</sup> All webcasters must pay a minimum of \$500 per year for the period between the enactment of DMCA and the end of that year, and a minimum of \$2,000 per year for the years 1999 through 2002.<sup>135</sup> For the years 2003 and 2004, small webcasters with gross revenues less than \$50,000 must pay at least \$2,000 per year and those with gross revenues greater than \$50,000 must pay at least \$5,000 per year.<sup>136</sup>

Any small webcaster can opt-in to the royalty rates set by the SoundExchange/Voice of Webcasters agreement by filling out a form on the SoundExchange website.<sup>137</sup> Webcasters who do not opt-in must pay the July rates established by the Librarian of

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<sup>128</sup> See Small Webcasters Settlements Act, Pub. L. No. 107-321 (Dec. 4, 2002) (to be codified in scattered sections of 17 U.S.C.); U.S. COPYRIGHT OFFICE, *supra* note 81.

<sup>129</sup> See, e.g., Brad Hill, *Small Webcaster Bill Passes*, DIGITAL SONGSTREAM, 2002, at <http://www.digitalsongstream.com/newslog/archives/00000081.htm> (on file with the North Carolina Journal of Law & Technology).

<sup>130</sup> Gabriel, *supra* note 103.

<sup>131</sup> Notification of Agreement Under the Small Webcaster Settlement Act of 2002, 67 Fed. Reg. 78,510 (Dec. 24, 2002) (to be codified at 37 C.F.R. pt. 261).

<sup>132</sup> See *id.* at 78,511, App. A (appendix not codified).

<sup>133</sup> See *id.* at 78,511, App. A § 3(a).

<sup>134</sup> *Id.* at 78,511, App. A § 3(b).

<sup>135</sup> *Id.* at 78,512, App. A § 5.

<sup>136</sup> *Id.* at 78,512, App. A § 5(3)-(4).

<sup>137</sup> *Id.* at 78,511, App. A § 2(a).



Congress.<sup>138</sup> Webcasters who do opt-in are assured the royalty rates outlined in the agreement through December 31, 2004.<sup>139</sup>

### III. Remaining Concerns in the Regulation of Internet Radio

#### A. Tear in the Webcasting Community

While recent legislative successes, especially the passage of SWSA, have been important steps toward saving small webcasters,<sup>140</sup> a need for further legislative action still exists. SWSA and the resulting SoundExchange agreement have caused a rift in the webcasting community. In particular, current legislation does not meet the needs of the smallest webcasters.<sup>141</sup> Small webcasters, including hobbyists, still face royalties that could drive them off Internet radio. While the SoundExchange payments are lower for small webcasters, they still are too high for the smallest webcasters to afford.<sup>142</sup> Some hobbyists pay just \$4.95 per month to air their radio shows, which would cost only \$282 for seven years of broadcasting.<sup>143</sup> Small webcasters paying the minimum allowable rates under the SoundExchange agreement will owe over

<sup>138</sup> See *id.*

<sup>139</sup> *Id.* Webcasters receive this assurance so long as they continue to qualify as "small webcasters" under § 8(f) of the agreement. *Id.* at App. A § 8(f).

<sup>140</sup> The legislation reflects a compromise for all the parties directly affected by this

legislation. . . . Clearly, the 'Small Webcaster Amendments Act of 2002'. . . is an imperfect bill that doesn't fix everything for everybody. . . . Still, overall, does it do more good than harm for more people? My belief is that many are helped one way or the other and virtually no one is assured of being hurt. Thus, the answer, on the whole, would be yes.

148 CONG. REC. S11,139 (daily ed. Nov. 14, 2002) (statement of Sen. Leahy).

<sup>141</sup> Telephone interview with Brian Peters, Assistant Press Secretary, Office of Congressman Jay Inslee (Feb. 3, 2003).

<sup>142</sup> Interview with Jason Perlmutter, Station Manager, WXYC-FM, University of North Carolina at Chapel Hill (Mar. 5, 2003).

<sup>143</sup> See *TerraDigital Systems(TM) LLC Debuts Wireless Digital Audio Jukebox(TM) at Prestigious DEMO 2003 Event*, *supra* note 36.

\$10,000 for those same seven years,<sup>144</sup> with just over \$9,000 of that amount due on June 20, 2003.<sup>145</sup>

Losing the smallest webcasters will likely result in a loss of the variety that makes Internet radio special.<sup>146</sup> While the recording industry has failed to recognize the value of Internet radio's unique programming,<sup>147</sup> that variety has been the subject of praise by legislators.<sup>148</sup> In addition, variety is one of the leading reasons Internet radio listeners tune in.<sup>149</sup>

No one represented the smallest webcasters during the royalty debates or resulting negotiations.<sup>150</sup> One webcaster

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<sup>144</sup> Small hobbyists paying the minimum allowable rates under the SoundExchange agreement would owe approximately \$125 for the months October through December 1998 (at a rate of \$500 for the year) plus \$2,000 per year for the years 1999 through 2004. See Notification of Agreement Under the Small Webcaster Settlement Act of 2002, 67 Fed. Reg. 78,512, App. A § 5(3)-(4) (Dec. 24, 2002) (appendix not codified).

<sup>145</sup> Minimum allowable payments under the agreement for the period from October 1998 through June 20, 2003 would equal approximately \$125 for the months October through December 1998 (at a rate of \$500 for the year) plus \$2,000 per year for the years 1999 through 2002 plus \$1,000 for the months January through June 2003 (at a rate of \$2,000 per year). See *id.*

<sup>146</sup> Much of the "free-wheeling nature and diversity of Internet radio. . . is provided by small businesses, community and college broadcasters and hobbyists." Healey, *supra* note 31 at 5.

<sup>147</sup> For example, John Simpson, Director of SoundExchange, stated in a National Public Radio interview, "Radio is not in the music business. They're in the advertising business." National Public Radio interview with John Simpson, Director of Sound Exchange. Brancaccio, *supra* note 85. A 2001 survey of Internet-only webcasters, broadcasters who stream, and other technology companies suggests this message is being spread to the webcasting community. Eighty percent of webcasters now place ads in their webstream. ARBITRON, *supra* note 34.

<sup>148</sup> Throughout the royalty rate debates, legislators referred to the importance of the variety provided by Internet radio stations. For example, Representative McCarthy said during the SWAA debate, "This lower payment schedule will ensure that Internet radio continues to offer consumers a nearly endless number of listening choices including Latin, classical, and even native African music that may not be available over terrestrial stations." 148 CONG. REC. H7048 (daily ed. Oct. 7, 2002) (statement of Rep. McCarthy).

<sup>149</sup> See survey results from Internet radio listeners from FITZGERALD AND ROSIN, *supra* note 9.

<sup>150</sup> "Indeed, the concerns of many small webcasters were never heard, since the cost of participating in the proceedings was prohibitively expensive and their

explains, “[t]he people at the negotiating table did not represent the broad spectrum of webcasters that are operating today. There were no educational webcasters, no non-profit webcasters, and no hobbyist webcasters at the negotiating table, nor did these groups have any significant input into the negotiating agenda.”<sup>151</sup> During the week following passage of SWAA in the House, webcasters who felt their voices were not represented by the “Sensenbrenner Thirteen” formed the Webcaster Alliance.<sup>152</sup> The group’s membership is composed of “webcasters, hardware and software suppliers, support services providers, content providers and Internet Radio listeners.”<sup>153</sup>

Since many of the “Sensenbrenner Thirteen” webcasters made up the Voice of Webcasters group that negotiated the SoundExchange agreement,<sup>154</sup> concerns about their ability to represent the Internet radio community persist. For example, some critics point to the fact that the International Webcasters Association (IWA), to which many of the commercial webcaster members of the “Sensenbrenner Thirteen” belong, has not endorsed the SoundExchange agreement.<sup>155</sup> One high profile member of the established trade group even resigned in protest over the royalty issue.<sup>156</sup>

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ability to participate for free was barred by procedural rules.” 148 CONG. REC. S11,139 (daily ed. Nov. 14, 2002) (statement of Sen. Leahy).

<sup>151</sup> *Id.*

<sup>152</sup> The mission of the Webcaster Alliance is two-fold: “To support the budding webcasting industry as it moves forward, and to quantify through statistics that internet radio and webcasting as a whole provide promotional value to artists, educational value to the online community and viable, growing investment opportunities to the Venture Capital community.” Ann Gabriel, *What Webcaster Alliance Is All About*, WEBCASTER ALLIANCE, Oct. 18, 2002, at [http://www.webcasteralliance.com/modules/news/article.php?item\\_id=1](http://www.webcasteralliance.com/modules/news/article.php?item_id=1) (on file with the North Carolina Journal of Law & Technology).

<sup>153</sup> *Id.*

<sup>154</sup> Gabriel, *supra* note 103.

<sup>155</sup> The International Webcasting Association (IWA) is the oldest and most established trade group in Internet radio and was formed in 1996. *See* INTERNATIONAL WEBCASTING ASSOCIATION, WORKING TOGETHER, BUILDING THE FUTURE (2003), at <http://www.webcasters.org/>.

<sup>156</sup> *See* Letter from Ann Gabriel, (Oct. 11, 2002), at <http://www.neworleansradio.com/ArticlesDetail.asp?ID=68> (on file with the North Carolina Journal of Law & Technology).

Furthermore, Internet radio legislation since 1995 has been based on faulty assumptions about webcasting. In 1995, Congress addressed the issue of digital music transfer after becoming concerned about unauthorized copying of music.<sup>157</sup> However, Internet radio is very different from the controversial Napster service, which allowed listeners to download songs directly to their computers.<sup>158</sup> Internet radio “streams” in real-time like traditional radio broadcasts and does not allow listeners to select the individual songs they want to hear.<sup>159</sup> At least one court has recognized this distinction. The United States District Court for the Southern District of New York observed, “. . . ‘webcast’ and ‘digital downloading’ are not the same. . . . A webcast. . . is ‘broadcasting’ such as over the radio and while a recording can be made therefrom, it has flaws of transmission, whereas digital downloading is the ability to obtain an identical duplicate of the master which thus has resale value equivalent to the master.”<sup>160</sup> Put simply, the unauthorized copying fears on which legislation has been based have not been realized in Internet radio.<sup>161</sup>

Additionally, Internet radio serves a promotional function, similar to traditional radio’s congressionally recognized promotional function during the early twentieth century.<sup>162</sup> Although the RIAA disagrees,<sup>163</sup> available Internet use statistics

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<sup>157</sup> See Digital Millennium Copyright Act, Pub. L. No. 105-304 (Oct. 28, 1998) (to be codified at 17 U.S.C. § 114).

<sup>158</sup> For a brief explanation of how Napster worked, see Lee B. Burgunder, *Commentary: Reflections on Napster: The Ninth Circuit Takes a Walk on the Wild Side*, 39 AM. BUS. L.J. 683, 683 (Summer 2002).

<sup>159</sup> See *Congressional Testimony*, *supra* note 25.

<sup>160</sup> *Profile Publ’g & Mgmt. Corp. APS v. Musicmaker.com, Inc.*, 2003 U.S. Dist. LEXIS 991, at \*11–12 (S.D.N.Y., Jan. 23, 2003).

<sup>161</sup> These fears have not been realized simply because the technology does not allow copying in the same way Napster did. See *Congressional Testimony*, *supra* note 25.

<sup>162</sup> For example, some webcasters view their broadcasts as “a service to the independent music community—artists, small labels, and consumers.” E-mail interview with Joe Franklin, Co-General Manager, WXDU-FM at Duke University (Mar. 5, 2003) (on file with the North Carolina Journal of Law & Technology).

<sup>163</sup> One industry man stated:

support the idea that webcasting boosts record sales. Among those who listen to Internet radio on a weekly basis, 48% have purchased a CD because they heard the artist on a webcast.<sup>164</sup> In fact, Internet radio provides a unique means of selling music that traditional radio stations cannot offer; listeners can purchase music from the same source that plays that music for them. A recent Arbitron survey reveals 23% of survey respondents “would be very interested in purchasing music CDs and tapes off. . . [a] station Website.”<sup>165</sup> Enacted legislation fails to recognize Internet radio’s promotional function.

Finally, even if webcasters and the recording industry become satisfied with the current royalty rate structure, there is no assurance that a similar battle will not occur when the SoundExchange agreement expires at the end of 2004. Legislative action could keep the smallest webcasters in operation through 2004 and provide certainty for all webcasters after that date.

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[A] member of the RIAA legal staff. . . look[ed] me in the eye and. . . [said] that unless we were running tightly-controlled playlists of nothing but the top big-label hits (just like terrestrial radio) they saw no promotional value whatsoever to them in our efforts to promote artists & CD sales.

Bill Searls, *Views on Linux in Business*, SUITWATCH, Oct. 17, 2002, at <http://www.ssc.com/pipermail/suitwatch/2002q4/000032.html> (on file with the North Carolina Journal of Law & Technology) (quoting Bill Goldsmith).

<sup>164</sup> ARBITRON, *supra* note 8 at 25. Moreover, people who frequently listen to Internet radio generally buy more CDs than those who listen less frequently. On average, those who listen to Internet radio weekly bought twenty-one CDs in the past year, while those who listened monthly bought eighteen, and those who listened less frequently bought only fifteen. Listeners in each of these categories bought more CDs than the average American, who purchased thirteen over the past year. *Id.* at 21.

<sup>165</sup> FITZGERALD AND ROSIN, *supra* note 9. “Music CDs, tapes and computer items are the most frequently purchased items online.” *Id.* at 12.

## B. Mending the Internet Radio Community's Wounds

### 1. Regulating the Smallest Webcasters

Currently, nonprofit, college radio, and hobbyist webcasters must pay the steep minimum rates set by the SoundExchange agreement, negotiate their own agreements, or pay the Librarian of Congress' July 2002 rates, which legislators recognized as excessive for small webcasters in SWSA.<sup>166</sup> In order to keep the smallest webcasters in business through December 2004, legislators should create a new system for regulating hobbyist, college radio, and other nonprofit stations. The best legislation would encourage small webcasters' growth while ultimately benefiting the recording industry.<sup>167</sup>

Although a rate based on revenues, like the SoundExchange agreement, is best for start-up and smaller webcasters,<sup>168</sup> hobbyist, college stations, and nonprofits that broadcast purely for entertainment or informational purposes often have no revenues.<sup>169</sup> The DMCA already regulates how the smallest webcasters air their programs with restrictions such as a limit on the number of a single artist's songs a webcaster may play consecutively.<sup>170</sup> In addition to these existing regulations, new legislation could create a tiered system, placing small webcasters

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<sup>166</sup> See S. Amend. 4955, 107th Cong. (2002).

<sup>167</sup> It is possible for dedicated hobbyists to grow their stations quickly, ultimately becoming commercial webcasters who pay significant royalty fees. For example, Radioio is now one of the largest Internet radio stations, but began two years ago in a garage. Telephone interview with Mike Roe, Webcaster, Radioio.com (Feb. 2, 2003).

<sup>168</sup> Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings, 67 Fed. Reg. 45,240 (July 8, 2002) (to be codified at 37 C.F.R. pt. 261) (citing Live365 Petition at 8).

<sup>169</sup> For example, Ray Shaw, webmaster of WMBC at the University of Maryland, Baltimore County, explains, "It's important to realize that WMBC is completely non-profit. We can't have any advertising, and therefore don't have any 'revenue.'" Ray Shaw, *The Battle over Web Radio Continues*, SALON.COM, Apr. 17, 2002, at

[http://www.salon.com/tech/letters/2002/04/17/web\\_radio/print.html](http://www.salon.com/tech/letters/2002/04/17/web_radio/print.html) (on file with the North Carolina Journal of Law & Technology).

<sup>170</sup> See Rose, *supra* note 69.

in royalty rate categories according to the total number of simultaneous listeners they serve.<sup>171</sup> For example, new legislation might set a \$250 yearly rate for hobbyist, college, or nonprofit stations that broadcast to no more than twenty-five listeners at a time, and gradually could increase that rate for those who serve larger audiences.<sup>172</sup>

Limiting royalty fees to prospective broadcasts or charging only a nominal retroactive fee would also assist the smallest webcasters. While some could afford the minimum SoundExchange rates for the current year and the year 2004,<sup>173</sup> the lump sum payment for the years 1998 through 2002 is too high for many.<sup>174</sup> Moreover, many of these small broadcasters are nonprofit and are prohibited from increasing income by accepting advertising.<sup>175</sup>

Allowing, or even requiring, the hobbyist, college, and nonprofit webcasters to provide links to sites where listeners can purchase the music they hear in exchange for lower royalty fees would ensure the promotional value of broadcasts, perhaps offsetting the need for royalty payments. New legislation might also provide a group license to entities that host hobbyist webcasters, such as live365.com, which can then spread royalty

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<sup>171</sup> One small webcasters defines himself in exactly this way, explaining, "I am not a 'true' broadcaster. I am a hobbyist. I play audio to an audience that has never reached the 25 connection limit, having peaked once at 19." Letter from Phil Benton, SALON.COM, *at*

[http://www.salon.com/tech/letters/2002/04/17/web\\_radio/index1.html](http://www.salon.com/tech/letters/2002/04/17/web_radio/index1.html) (on file with the North Carolina Journal of Law & Technology).

<sup>172</sup> On the other hand, a rate tied to the number of songs played and number of listeners makes affording broadcasts difficult for hobbyists whose stations become popular.

<sup>173</sup> College radio stations might be able to afford prospective SoundExchange rates. The typical annual budget of a college radio station is between \$10,000 and \$30,000. E-mail interview with Joe Franklin, Co-General Manager, WXDU-FM, Duke University (Mar. 5, 2003) (on file with the North Carolina Journal of Law & Technology).

<sup>174</sup> Many hobbyists and others who make no money off their Internet radio broadcasts might have to pay out of personal funds.

<sup>175</sup> Personal interview with Jason Perlmutter, Station Manager, WXYC-FM, University of North Carolina at Chapel Hill (Mar. 5, 2003).

costs among many hobbyists.<sup>176</sup> However, the particular details of new legislation to regulate hobbyist, college radio, and nonprofit webcasters are not as important as providing some relief before the royalty payment deadline this summer.

## 2. Reforming the Webcasting Royalty Rate Decision Process

To avoid placing webcasters, small or large, in a royalty fight similar to the one that arose in 2002, Congress should reform the CARP process.<sup>177</sup> This will ensure that the government has in place a system for setting acceptable royalty rates for all types of webcasters when the SoundExchange agreement expires in December 2004.<sup>178</sup> In addition, benefits of CARP reform have the potential to ease disputes in additional areas of copyright law.<sup>179</sup>

Since 1993, CARPs have been responsible for setting "royalty rates and distribut[ing] royalties collected under the various compulsory licenses and statutory obligations of the Copyright Act."<sup>180</sup> When arbitration proceedings are initiated in a copyright dispute,<sup>181</sup> the Librarian of Congress selects two arbitrators from a list of between thirty and seventy-five pre-

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<sup>176</sup> For example, Live365 hosts hobbyists. See LIVE365, at <http://www.live365.com>.

<sup>177</sup> Members of the public who are interested in the issue appear to support legislative action to keep webcasters in business. Sixty-two percent of people who listen to Internet radio on a monthly basis "[w]ould be 'Very or Somewhat Upset' if you could no longer listen to Internet audio webcasts due to new digital-rights fees." ARBITRON AND EDISON MEDIA RESEARCH, *supra* note 8 at 24. In addition, sixty-four percent of people who listen to Internet radio on a monthly basis "[s]upport action by Congress to address music licensing fees in ways that would help webcasters continue streaming music." *Id.*

<sup>178</sup> The SoundExchange agreement contains no provision for rates after December 2004. See Notification of Agreement Under the Small Webcaster Settlement Act of 2002, 67 Fed. Reg. 78,510 (Dec. 24, 2002) (to be codified at 37 C.F.R. pt. 261).

<sup>179</sup> For example, CARPs also have authority to set rates for the television, theater, and telecommunications industries. Copyright Arbitration Royalty Panels, 59 Fed. Reg. 63,025 (Dec. 7, 1994) (citing Pub. L. No. 103-198).

<sup>180</sup> *Id.*

<sup>181</sup> See 17 U.S.C. § 803 (2001).



approved members of professional arbitration organizations.<sup>182</sup> The two selected arbitrators choose a third from the same list to serve as chairperson of the CARP.<sup>183</sup> CARP hearings are governed by their own rules of procedure and evidence.<sup>184</sup> Final CARP recommendations are subject to reform by the Librarian of Congress,<sup>185</sup> and interested parties may then appeal decisions to the United States Court of Appeals for the District of Columbia.<sup>186</sup>

Reform of this CARP process is gaining attention and support.<sup>187</sup> For example, during the SWSA debates, Senate Judiciary Chairman Patrick Leahy called for CARP reform, saying,

Passage of this legislation does not mean that our work is done. . . . To avoid repeated requests for the Congress or the courts to intercede, we must make sure the procedures and standards used to establish the royalty rates for the webcasting and other compulsory licenses produce fair, workable results.

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<sup>182</sup> 17 U.S.C. § 802(a), (b) (2001).

<sup>183</sup> *Id.*

<sup>184</sup> CARPs follow the "Copyright Arbitration Royalty Panel Rules of Procedure." See, e.g., NIMMER, *supra* note 39 at § 251.41 - § 251.48.

<sup>185</sup> 17 U.S.C. § 802(f) (2001). See *Nat'l Ass'n of Broadcasters v. Librarian of Cong.*, 146 F.3d 907, 913 (D.C. Cir. 1998).

<sup>186</sup> 17 U.S.C. § 802(g) (2001). See *Broadcasters*, 146 F.3d at 913.

<sup>187</sup> The Committee on House Judiciary Subcommittee on Courts, the Internet and Intellectual Property held a hearing on June 13, 2002 to discuss CARP reform. More generally, Doug Newcomb, director of public policy for the Special Libraries Association observed "Without a doubt, 2003 will be a heavy year for congressional activity on digital rights and DRM." Gail Dykstra, *Digital Rights Hangover*, 20 INFORMATION TODAY 12 (Jan. 1, 2003). In Congressional hearings, Harvard law professor William Fisher has proposed several alternatives to the CARP system, including:

- (1) Authoriz[ing] artists to insert simple watermarks in their creations;
- (2) Tax[ing], at the multilateral or national level, things such as ISP access and various technologies on which the music is performed;
- (3) Count[ing] the frequency with which each digital product is consumed; [and]
- (4) Distribut[ing] the revenue from taxes in the proportion in which the various products are accessed.

*Watermarks*, *supra* note 93.

Next year, we should focus attention on reforming the CARP process.<sup>188</sup>

The CARP process must include an opportunity for the smallest webcasters, including hobbyists, to participate in rate setting. The estimated cost of participating in the 2002 CARP hearings was \$10 million per interest group.<sup>189</sup> In order to have standing to challenge a CARP decision, a party must have participated in the original hearings.<sup>190</sup> This effectively leaves small webcasters out of the decision-making process.

The CARP process also needs greater continuity. New arbitrators are selected for each dispute and the complete list of arbitrators changes every two years.<sup>191</sup> As a result, "consistency [for complainants] is elusive."<sup>192</sup> The Copyright Office should establish a permanent, independent entity or division of the Copyright Office to make royalty rate decisions,<sup>193</sup> giving arbitrators the time necessary to gain expertise in the issues they hear.

In a webcasting royalty rate hearing, CARPs are required to tie their recommendations to a willing buyer/willing seller model,

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<sup>188</sup> 148 CONG. REC. S11,139 (daily ed. Nov. 14, 2002) (statement of Sen. Leahy).

<sup>189</sup> Holland, *supra* note 118 at 10.

<sup>190</sup> Andrea Bates, *Webcasters Face Retroactive Royalties in October*, NATIONAL LAW JOURNAL, Sept. 23, 2002, at B8.

<sup>191</sup> NIMMER, *supra* note 39 at § 251.3.

<sup>192</sup> This is a suggestion of the Motion Picture Association of America, which participates in the CARP process just as radio stations do. Press Release, Motion Picture Association of America, MPAA Supports Reform of CARP Process and Submits Proposals to Congress (June 13, 2002), at [http://www.mpa.org/legislation/press/2002/2002\\_06\\_13.htm](http://www.mpa.org/legislation/press/2002/2002_06_13.htm) (on file with the North Carolina Journal of Law & Technology).

<sup>193</sup> Similar legislation was introduced in Congress in 1998. H.R. 3210, 105th Cong., 2d Sess. (1998) and S. 1720, 105th Cong., 2d Sess. (1998) would have "replace[d] the ad hoc CARP system with a permanent Copyright Royalty Adjudication Board composed of full-time chief administrative copyright judges, and such part-time administrative copyright judges as the Librarian upon the recommendation of the Register, finds necessary." Testimony of Michael Remington, attorney representing Broadcast Music, Inc., Federal Document Clearing House Congressional Testimony June 13, 2002. However, CARP reform was only one of many components included in that legislation. See H.R. 3210, 105th Cong., 2d Sess. (1998).

looking to the private marketplace for sample rates.<sup>194</sup> In other disputes, CARPs use different standards, setting rates “based on fair return and a balancing of competitive interests. . .” or “fair market value.”<sup>195</sup> Allowing CARPs to decide webcasting rates without restricting them to the rates of privately negotiated agreements will result in more reasonable rates for small webcasters.<sup>196</sup> In addition, a revised decision-making method would more accurately reflect the intent of legislation now applied to webcasting.<sup>197</sup>

CARP reform will result in more reasonable webcasting royalty rate determinations. Such reform measures include making it easier for interested parties to participate in CARPs, providing more continuity in the process, and allowing arbitrators to consider all applicable evidence when setting rates. Furthermore, there would be less need for Congress to override unsatisfactory CARP determinations, unlike in 2002.

#### IV. Conclusion

Over the past three years, legislative efforts to balance the interests of the recording industry and webcasters have torn apart the webcasting community. As Internet radio is still in its infancy, mending this tear now could help Internet radio develop to its full potential. The legislature is best poised to enact the types of changes necessary to achieve this goal because the webcasters left out of the process are much too small to effectively negotiate with the recording industry for their own solution to the problem.

A two-pronged approach to royalty rate reform would be most effective for webcasters of all sizes. First, Congress should pass legislation setting special hobbyist, college, and nonprofit royalty rates. Allowing those webcasters to pay royalties tied more

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<sup>194</sup> U.S. COPYRIGHT OFFICE, *supra* note 74.

<sup>195</sup> See *Copyright Arbitration Royalty Panel Oversight: Hearing Before Committee on House Judiciary Subcommittee on Courts, The Internet and Intellectual Property*, 109th Cong. (June 13, 2002) (statement of Representative Zoe Lofgren), available at <http://www.house.gov/judiciary/lofgren061302.htm>.

<sup>196</sup> See *id.*

<sup>197</sup> See, e.g., H.R. 5285, 107th Cong. (2002).

closely to their business models or make efforts to promote record sales in lieu of paying royalties would ensure protection of artists' performance rights, while preventing an undue burden on small webcasters. Second, Congress should reform the CARP system to protect the smallest webcasters' unique broadcasts. Even if the legislature is able to craft a solution to the current royalty rate dispute, future disagreements will only be avoided if the CARP process is reformed. Allowing small webcasters to participate in the CARP process cost-free, appointing arbitrators to serve terms longer than two years, and allowing them to borrow rate-setting standards from industries with similar business models would provide the continuity and fair representation now lacking in the CARP process.

Webcasters have only until June 20, 2003 to reach a satisfactory result on the issue of royalty payments. On that date, they must have negotiated their own royalty rate agreements or pay the Librarian of Congress' controversial rates.<sup>198</sup> Solving the royalty rate dispute to the satisfaction of webcasters of all sizes will help avoid a time when Internet radio broadcasts feature only public domain songs such as "Jeannie with the Light Brown Hair," as happened on traditional radio stations in midst of the royalty disputes of the early 1940s. Legislators must take action now to keep our most unique Internet radio stations on-air.

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<sup>198</sup> See Small Webcasters Settlements Act, Pub. L. No. 107-321 (to be codified in scattered sections of 17 U.S.C.).

